

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA
FILED DEC 15 1937

Thomas Barry

**In the United States Court of Appeals
for the District of Columbia**

OCTOBER TERM 1937

No. 7049

214

THOMAS BARRY, APPELLANT

v.

**ROSCOE W. HALL, M. D., SUPERINTENDENT OF ST.
ELIZABETHS HOSPITAL, APPELLEE**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF COLUMBIA**

BRIEF FOR APPELLEE

LESLIE C. GARNETT,
United States Attorney,
ALLEN J. KROUSE,
Assistant United States Attorney,
Attorneys for Appellee.

**In the United States Court of Appeals
for the District of Columbia**

OCTOBER TERM 1937

No. 7049

THOMAS BARRY, APPELLANT

v.

ROSCOE W. HALL, M. D., SUPERINTENDENT OF ST.
ELIZABETHS HOSPITAL, APPELLEE

*APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF COLUMBIA*

BRIEF OF APPELLEE

STATEMENT OF THE CASE

This is an appeal from an order of the District Court of the United States for the District of Columbia discharging a writ of habeas corpus and concerns the commitment to St. Elizabeths Hospital of Thomas Barry, the appellant herein, by the Secretary of the Treasury.

The principal question involved in this appeal is with respect to the authority of the Secretary to commit. Because the record in this case is not printed, for the convenience of the Court there is

reproduced in the appendix of this brief substantially the whole record.

ARGUMENT

I

The legislation is valid

The Secretary acted under authority of Section 193, Title 24, United States Code. This statute is as follows:

Admission; insane patients of Public Health Service: Insane patients of the Public Health Service shall be admitted into Saint Elizabeths Hospital upon the order of the Secretary of the Treasury, and shall be cared for therein until cured or until removed by the same authority. The Public Health Service shall pay to Saint Elizabeths Hospital the actual per capita cost of maintenance in the said hospital of patients committed by that service. (Mar. 3, 1875, c. 156, Sec. 5, 18 Stat. 486; July 1, 1902, c. 1370, Sec. 1, 32 Stat. 712; Aug. 14, 1912, c. 288, Sec. 1, 37 Stat. 309; July 1, 1916, c. 209, Sec. 1, 39 Stat. 309; July 1, 1918, c. 113, Sec. 1, 40 Stat. 644.)

The record shows that the appellant was committed as a Public Health Service case (Merchant Seaman). (See Ti. 46, Secs. 1, 2 et seq.) This statute is an amendment of the original Act of Congress (18 Stat. 486) and the provisions with respect to commitment are substantially the same as the original Act except that in the original statute

the Public Health Service was then known as "Marine-Hospital Service." This statute broadened the scope of the objects for which St. Elizabeths Hospital was established. The act establishing St. Elizabeths Hospital is as follows:

There shall be in the District of Columbia a government hospital for the insane, which shall be known and designated as St. Elizabeths Hospital, and its objects shall be the most humane care and enlightened curative treatment of the insane of the Army and Navy of the United States and of the District of Columbia. (R. S. Sec. 4838; July 1, 1916, c. 209, Sec. 1, 39 Stat. 309; Sec. 161, Title 24, U. S. C.)

This act of establishment was further amended with respect to the commitment of members of the Army, Navy, Marine Corps, and Coast Guard. (See Sec. 191, Title 24, U. S. C.) It certainly can not be gainsaid that Congress did not have the power to pass the aforementioned acts with respect to the Army, Navy, Marine Corps, Coast Guard, and Merchant Marine. The Constitution (Sec. 8, Article 1) gives Congress the power to regulate commerce with foreign nations and among the several States, and also to make rules for the government and regulation of the land and naval forces. The Congress would be derelict in its duty not to pass such legislation. It at least is the duty of the Congress as *parens patriae* to the classes designated in the

aforementioned acts. In *Fontain v. Ravenel*, 17 How. 369, 384, 15 L.E. 80, 86, the court stated:

When this country achieved its independence, the prerogatives of the Crown devolved upon the people of the states, and this power still remains with them except so far as they have delegated a portion of it to the Federal Government. The Sovereign will is made known to us by legislative enactment. The state, as a sovereign, is the *parens patriae*.

In *Mormon Church v. United States*, 136 U. S. 1; 34 L. E. 481, 496, Mr. Justice Bradley said:

The prerogative of *parens patriae* is inherent in the supreme power of every state, whether that power is lodged in a royal person or in the legislature, and has no affinity to those arbitrary powers which are sometimes exerted by irresponsible monarchs to the great detriment of the people and the destruction of their liberties. On the contrary it is a most beneficial function, and often necessary to be exercised in the interest of humanity and for the prevention of injuries to those who can not protect themselves. Lord Chancellor Somers in *Cary v. Bertie*, 2 Vern. 333, 342, said: "It is true infants are always favored. In this country there are several things which belong to the King as *pater patriae*, and fall under the care and direction of this court, as charities, infants, idiots, lunatics, etc."

The Supreme Court of the United States has already held in two cases that the doctrine of *parens patriae* applies to the United States as well as the states. *Florida v. Mellon*, 273 U. S. 12; *Mass. v. Mellon*, 262 U. S. 447.

It is believed, therefore, from what has been stated that there can be no question with respect to the validity of the legislation in question.

II

The commitment is valid

The only thing that remains is the mode of commitment. Is the lunatic entitled to a hearing before a jury on the question of his sanity before commitment? To answer this question, an examination must be made of the constitutional provisions for jury trials. The first is found in Section 2, Article 3, as follows:

The trial of all crimes, except in case of impeachment, shall be by jury; * * *.

The second is found in Article 6, as follows:

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, * * *.

The third is found in Article 7, as follows:

In suits at common law where the value in controversy shall exceed \$20.00, the right of trial by jury shall be preserved, * * *.

It can be seen that none of these provisions has any application here because a proceeding to commit a lunatic is neither a criminal proceeding nor a suit at common law where the value in controversy is more than \$20.00. Therefore, an alleged lunatic is not entitled to a jury trial, at least so far as the United States is concerned, except where authorized by specific legislation. The only remaining question with respect to the commitment is whether or not there has been a violation of the Fifth Amendment, namely, that no person shall "be deprived of life, liberty, or property without due process of law." What is due process of law? The Supreme Court of the United States in *Ballard v. Hunter*, 204 U. S. 241; 51 L. E. 461, 472, said:

A precise definition has never been attempted. It does not always mean proceedings in court * * *. Its fundamental requirement is an opportunity for a hearing and defense, but no fixed procedure is demanded. The process or proceedings may be adapted to the nature of the case.

Certain regulations with respect to the Public Health Service and its internal administration have been promulgated from time to time by the President of the United States, the latest having been promulgated June 18, 1931, by President Herbert Hoover. These latest regulations appear in a bound volume designated "Regulations for the Government of the United States Public Health Service." Under the caption "Neuropsychiatric

Patients," appearing on page 99 of these regulations, we find the following:

508. Any patient believed to be insane and a menace to himself or others may be taken before a competent local authority. If adjudged insane, appropriate recommendation shall be made to the Surgeon General by the Medical Officer in charge for transfer to a special institution for treatment. Patients who are not dangerous and who acquiesce in the arrangement may be transferred without being adjudged insane; but in all cases the consent of the guardian, if there is one, should be secured before the transfer is made, if practicable. If there is no guardian, relatives or responsible friends should be informed whenever an irresponsible patient is to be committed for transfer, and their acquiescence in the final arrangement secured, if practicable. Due consideration should be given to their desires for the commitment of the patient to an institution of the state of which the patient may be a citizen, the Service relinquishing custody and financial responsibility under appropriate circumstances. The laws of the several states governing the admission of insane patients to state institutions must be strictly adhered to.

In this case, the record does not show that the procedure outlined in these regulations was, or was not, followed. The court must presume, therefore, that such procedure was followed. (See *Hayes v.*

U. S., 170 *U. S.* 637, 42 *L. E.* 1174; *King v. Mullins*, 171 *U. S.* 404, 43 *L. E.* 214; 22 *C. J. Secs.* 69, et seq., *Evidence.*)

It is apparent that by these regulations the Government has endeavored to protect in every way possible the rights of the unfortunate people covered by the statute. The regulation says, "If adjudged insane" recommendation shall be made for the transfer of the person to a mental hospital. The regulation says further that a person who is not dangerous can not be transferred against his will "without being adjudged insane." In a word, the substance of this regulation is that the Government will only accept responsibility for the person as a last resort. If the Government can get neither relatives nor the State to assume custody and financial responsibility for the person, then the Government feels that it is duty bound because of the service of the person to see that he receives proper care and treatment, where the person is indigent and no one else will take him. The conclusion that the person must be indigent before the Secretary will commit him is inescapable for several reasons. First, the statute provides that the Public Health Service shall pay the actual per capita costs of maintenance. Second, there is no provision in either the act or the regulations that the Government will pay their keep in a State institution; and, third, there is nothing in either the statute or the regulations which provides for the

preservation of the estate or property of an insane patient.

It can not be seen what difference it makes, in the light of the language of the Supreme Court in *Ballard v. Hunter, supra*, where or before whom the hearing is held as long as there is a hearing. The fundamental requirements of due process being an opportunity for a hearing and defense. The Supreme Court in *Simmon v. Craft*, 182 U. S. 427, 45 L. E. 1165 (a lunacy case), reiterated the above as follows:

The due process clause of the Fourteenth Amendment does not necessitate that the proceedings in a state court should be by a particular mode, but only that there shall be a regular course of proceedings in which notice is given of the claim asserted, and an opportunity afforded to defend against it.

As has been said before, the Congress, and the courts as well, have a duty as *parens patriae* to provide care and protection for those who are incapable of caring for themselves because of mental illness and also a duty to protect the public. The legislation in question is very humane in its purpose. The Government says in effect that anyone who has served it is entitled to treatment for physical as well as mental illness. The Government has no desire to hold anyone against his will because of mental disability any more than for physical infirmities. If the appellant had been suffering from tuberculosis or syphilis, he would be entitled

to care and treatment at a government hospital for these diseases. A request would be made for admission to a hospital the same as the request for treatment of a mental disease. It is not beyond the realm of possibility that treatment for tuberculosis or syphilis might extend for a life time and necessitate constant confinement in a hospital. Who can say that such confinement for these diseases is illegal? If a person in the government service contracts during the service such diseases as tuberculosis or syphilis, and is indigent and has no one to assume responsibility for his care and treatment, and the Government extends a helping hand to have him committed to a hospital for appropriate treatment, who would say that such commitment was illegal? Of course, the time might come when that person would be cured and able to resume his former activities in society and the hospital would refuse to permit him to leave. In that event, any detention would be illegal and the person would be entitled to his release on habeas corpus. In the case of a person suffering from mental disease, the situation is slightly different. A person may be so mentally disordered as to be unable to judge for himself that treatment is necessary, and this is often the case. However, there are some cases where a mental patient is not dangerous and the regulations which have been referred to above provide that in such cases, if the patient acquiesces, he "may be transferred" to a hospital "without being adjudged insane."

The Government not only should provide care and treatment for those in its service who are ill, but it is its duty to do so, not only for the betterment of the government service, but for the protection of those citizens who are not ill and who are constantly menaced by persons suffering from not only mental disease, but as well from contagious physical disease. Notwithstanding this, it is apparent that the government only assumes responsibility when it is absolutely necessary to do so. The reason for this, of course, is very apparent and that is because of the cost involved.

Lunatics not only come under the care and protection of the Congress but the courts as well. As Lord Chancellor Somers stated in *Cary v. Bertie*, *supra*:

* * * there are several things which belong to the King as pater patriae, *and fall under the care and direction of this court*, as charities, infants, idiots, lunatics, etc.

Therefore, protection is provided for the rights of the individual involved. When a lunatic in St. Elizabeths Hospital is brought to court on a writ of habeas corpus, the inquiry is directed, as in this case, to the question of sanity or insanity, and the court hears medical testimony of expert psychiatrists. From this testimony, the court determines whether or not the detention is lawful. Of course, the reason for the restraint is that the person is of unsound mind and in need of care and treatment.

Thus, a person receives a judicial hearing on the question which is involved in every habeas corpus proceeding, namely, whether or not he is being unlawfully restrained of his liberty. The record in this case shows that this appellant has had three judicial hearings on writs of habeas corpus.

III

The commitment itself

The insane person is not held or detained in the hospital by virtue of the commitment, but by virtue of the judgment or verdict of the Court, Board, or Commission. In *Hill v. Wampler*, 298 U. S. 460, a criminal case, although the principle is analagous, the court, quoting from other cases which it had decided, said:

The prisoner is detained not by virtue of the warrant of commitment but on account of the judgment and sentence.

In this same case the court also said:

If the judgment and sentence do not authorize his detention, no "mittimus" will avail to make detention lawful * * *.
* * * When "a prisoner is safely in the proper custody, there is no office for a mittimus to perform." * * * Even after such delivery, the warrant is convenient evidence for the protection of the jailer, but it may be lost or destroyed, and detention may be justified by the underlying judgment.

(See also the subject of Habeas Corpus in Ruling Case Law, Section 28.)

It is respectfully submitted that the statute and the commitment are valid.

LESLIE C. GARNETT,
United States Attorney,
ALLEN J. KROUSE,
Assistant United States Attorney.
Attorneys for Appellee.

APPENDIX

AFFIDAVIT OF POVERTY

Filed August 30, 1937

In the District Court of the United States for the
District of Columbia

No. 1912. Habeas Corpus

THOMAS BARRY, PETITIONER, *against* ROSCOE W.
HALL, M. D., RESPONDENT

DISTRICT OF COLUMBIA,
City of Washington, ss.:

Thomas Barry being duly sworn in his oath deposes and says I am the same Thomas Barry, who is the applicant for a writ of habeas corpus, in the petition submitted herewith. Makes this affidavit in order to obtain permission to sue as a pauper I own no real estate no stocks or bonds In fact no personal property of any kind tangible or intangible I have no source of income whatsoever

I haven't been adjudged insane Because I had no disease of any kind. No venereal or of an organic trouble whatever, But as shown in records here my pilot's license was revoked for a while. Then transferred to Washington all on account of a false report of multiple scleves made without examination. A disease as proven in the all normal examinations I never had at Washington,

Louisville, St. Louis, Memphis, and New Orleans, Marine Hospitals. At Evansville Ind Marine Hospital it is not known today whether or not the Wasserman test is positive or negative as they were no examination there notime And in March 1936 at Hitchcock Hall here Doctor Hall, now superintendent reported in confrence to the medical students. That they made notes of the Facts. That my diagnosis here is of a lead poisoning cause in which the diagnosis of a lead poisoning cause at New Orleans by the Government in 1932 is sustained here.

The expense bill of \$1200 returned to me on account of 12 trips to hot springs on account of lead poisoning being dislowed in 1935 on the false report of multiple sclevosis. But since the all normal examination was finally made here, The lead poisoning as stated is sustained and the bill is alowed in 1937

Also because the multiple sclevosis false reports are wiped off the books. That my St Louis to New Orleans Pilots license is restored. As I have a letter from the Inspectors to report in person for renewal of licens. Now.

Having passed a civil service examination in 1931 for pilot I now have the papers to present to court. I didnt have on July 27.

Also at the same time I am an inventor on a big scale having a lot of drawings made recently also to present to court for discharge I didn't have on July 27 My new invention business on hand was considered for discharge by court which I would of sure got. But I didnt have any drawings then as I have now or I would of ben discharged then sure.

So then—as indicated in the all normal examinations and the 35 new inventions of my make 17 contracted for. That probably not one person out of 300,000 produces the evidence I do of mental power. Makeing, something out of nothing The real skill estimated value \$300.000 or more.

My court letter of Feb 20 was a \$50 leave But I was not permitted out to get any of my money in Washington in the \$1200 bill, or in the \$5,500 contracts in my New inventions, to pay the leave which is at Cleveland Ohio

As to good meomery, I have the best, as I remember crossing the Mississippi River at 2 years old and all other big incidents since then.

Being much above normal boath physicially and mentally because like R B Wilson Marine Hospital at Memphis my home in his medical report states 90% of pilots are syphilitic and hasent the required normal eyes I have for pilot as shown here also in examinations because I had no disease. I contend the case.

On July 27 was a mistryle. Because I didnt have my Civil Service Papers I now have passed for pilot. Nor didnt have drawings of my new inventions I have now.

I have a discharge here now by Doctor Coshard. But my niece is to come to Washington for me, but as she lives in Illinois neare St. Louis and she hasent the cash money to make the trip. And as before in the appeal case I am still not permitted out to get my money to send my niece the transportation to make the trip to Washington D C with.

Therefore, the Honorable Court I am sure will make the discharge under the circumstances.

Not sick and havent ben sick. Not a hospital patient and never was, excepting for an appendicitis operation in 1931. But like many others when not on a boat they stay at Marine Hospital. Because I want to like many others, including the Doctors statement too, that if you dont fill up the Marine Hospitals the government might close then down. And you know, the Government did close the Marine Hospital at Cairo Illinois.

My wife and people are much worried and want me to return home and to pilot. Having long service on merchant vessels. Coming from deck hand and mate first class. Then second class pilot that I didnt want or use. This licens but first class pilot was made after some work.

Passing the Civil Service for first class pilot in 1931. That I didnt have this issue long. And would of got appointment in Aug 1932.

But licens was revoked for a while on the false report of multiple sclerosis. including an eyes trouble for pilot. But allso as known here I never had the multiple sclerosis and eyes are above normal and glasses here are not allowed because as they state I dont need them.

So then the 15 days has expired and my case may be filed at once. either in the habeas corpus petition. or in the appeal case is imitable. I know my big lot of work I have on hand. would discharge anybody. That will put people to work as an inventor. Estimated at at least \$300.00 value. People cant tell me what to do. But I tell them.

I have worked as many laborers as 100 at one time. In Boating. And above all. They cant make the inventions I do. And are prepared for Court. So then. Things are much different now. Than on July 27. Having the Civil Service papers for pilot. And the many new inventions drawings I didnt have on July the 27. As stated I lost 50 pound of flesh during confinement. Causing some weaksness.

But on return home I will soon gain my normal condition. And to pilot of a boat. And in my invention business on hand.

And as to the Civil Service papers it is imitearle. Because I can and blieve I will run on private owned Boats. As I have ben on much of my time.

You are also informed. That now the private owned boats are takeing over the Government work. On the Mississippi River. The engineers office will inform you. And I do know for a fact that I havent yet testified. In Court.

WHEREFORE this affidavit is made and I pray for an order permitting me to obtain a writ of habeas corpus as a pauper.

Very truly

THOMAS BARRY

Sworn to before me this 19th day of Aug 1937

[NOTARIAL SEAL.]

ROSCOE S. AULL,

Notary Public.

PETITION FOR A WRIT OF HABEAS CORPUS

Filed August 30, 1937

In the District Court of the United States for the
District of Columbia, Washington, D. C.

No. 1912. Habeas Corpus

THOMAS BARRY, PETITIONER, AGAINST ROSCOE W.
HALL, M. D., RESPONDENT

*To the Honorable Justice of the District Court of
the United States for the District of Columbia.*

Petitioner, appearing in his own behalf, respectfully alleges and shows to court as follows:

He sues as a pauper.

He has been a patient in St Elizabeth Hospital a Fedral Institution for the Insane since Sept 2 1935.

On Sept 1 1935 Petitioner was transferred to St. Elizabeth Hospital from U S Marine Hospital at Evansville Indiana against his will and despite his imphatic protest. Petitioner has never had a hearing before any Judicial Tribunal and alleges his liberty has been unlawfully taken away from him in violation of the provisions of Fifth Amendment to the Constitution of the United States.

Petitioner is sane and has never at any time ben insane. If any charges of insanity is made against petitioner same should be herd in a Judicial Tribunal. Petitioner is not a member of the Army or Navy, Marine Corps or Coast Guard.

The respondent Roscoe W. Hall M D is Supern-tendent of St Elizabeth Hospital and is unlawfully

detaining petitioner. Wherefore this petition is respectfully presented and petitioner prays that the writ of habeas corpus speedily issue and inquiry be had in the legality of petitioners incarceration. Very truly

THOMAS BARRY

CITY OF WASHINGTON,

District of Columbia, s. s.:

Thomas Barry being duly sworn deposes and says that he is the petitioner herein. That he has read the within petition and that the contents thereof are true to the best of his knowledge, information, and belief.

Sworn to before me this 19th day of August 1937.

[NOTARIAL SEAL]

ROSCOE S. AULL,
Notary Public.

ORDER

Filed August 30, 1937

District Court of the United States for the
District of Columbia

No. 1912. Habeas Corpus

In re: Petition of THOMAS BARRY for Writ of
Habeas Corpus

Let this petition be filed without prepayment of costs:

Let the Writ of Habeas Corpus issue returnable before this Court on the 8th day of September 1937 at 1:30 P. M.

F. DICKINSON LETTS,
Justice.

WRIT OF HABEAS CORPUS

Issued August 30, 1937

In the District Court of the United States for the
District of Columbia

No. 1912

In the matter of the petition for Writ of Habeas
Corpus for Thomas Barry

THE PRESIDENT OF THE UNITED STATES,

To ROSCOE W. HALL, Acting Superintendent, St.
Elizabeth's Hospital, Washington, D. C.

You are hereby commanded to have the body of Thomas Barry detained under your custody, as it is said, together with the day and cause of his being taken and detained, by whatever name he may be called in the same, before one of the Justices of the District Court of the United States for the District of Columbia in the United States Courthouse, city of Washington on the 8th day of September, 1937, at 1:30 P. M., after the receipt of this writ, to do and receive whatever shall then and there be considered of in his behalf, and have then and there this writ.

WITNESS, The Honorable Chief Justice of said Court the 30th day of August, A. D. 1937

[SEAL]

CHARLES E. STEWART, *Clerk.*By C. B. COFLIN, *Assistant Clerk.*

Marshal's Return

Personally by serving Roscoe Hall, etc.; August
31, 1937.

JOHN B. COLPOYS,

U. S. Marshal, D. C.

By GREEN GAILLARD, O.

RETURN AND ANSWER TO PETITION OF HABEAS
CORPUS

Filed September 8, 1937

In the District Court of the United States for the
District of Columbia

Habeas Corpus No. 1912

In re: THOMAS BARRY, petitioner

The return and answer on behalf of Dr. Roscoe W. Hall, Acting Superintendent of Saint Elizabeths Hospital, respectfully represents to the Court:

The respondent admits that the petitioner has been a patient in Saint Elizabeths Hospital since September 2, 1935.

The respondent admits that the petitioner was admitted to Saint Elizabeths Hospital by transfer from the United States Marine Hospital at Evansville, Indiana. A certified copy of the order for the petitioner's commitment by the Secretary of the Treasury as a Public Health Service (Merchant Seaman) case is attached hereto, marked "Exhibit A," and it is prayed that it be read as a part hereto, and the respondent therefore denies that the petitioner's liberty has been unlawfully taken from him.

The respondent denies that the petitioner is sane and that he has never at any time been insane. The respondents admits that the petitioner is not a member of the Army or Navy, Marine Corps or Coast Guard.

The respondent admits that he is Acting Superintendent of Saint Elizabeths Hospital, and denies that the petitioner is being unlawfully detained.

For further answer to the petition the respondent says that on January 26, 1937, and again on July 27, 1937, the petitioner appears in the District Court of the United States for the District of Columbia as the result of writs of habeas corpus No. 1874 and No. 1900, respectively, and that in each case the writ of habeas corpus was discharged, the petition dismissed, and the petitioner remanded to the custody of the respondent.

The respondent also says that the petitioner is still of unsound mind suffering from a psychosis with organic brain disease and is in need of continued care in a mental hospital. The petitioner manifests symptoms of mental disorder, among which are delusions, poor judgment, euphoria and also manifests definite physical signs of organic disease of the brain.

WHEREFORE, the premises considered, the respondent prays that the Writ herein be discharged, the petition dismissed, and the petitioner remanded to the custody of the respondent.

ROSCOE W. HALL,
Acting Superintendent,
Saint Elizabeths Hospital.

ALLEN J. KROUSE,
Ass't U. S. Attorney,
Atty. for respondent.

DISTRICT OF COLUMBIA, ss:

I, ROSCOE W. HALL, solemnly swear that I am Acting Superintendent of Saint Elizabeths Hos-

pital, and have read the foregoing return and answer by me subscribed and know the contents thereof; and verily believe the same to be true.

ROScoe W. HALL,
*Acting Superintendent,
Saint Elizabeths Hospital.*

Sworn to before me this 2nd day of September,
A. D. 1937.

[NOTARIAL SEAL.]

PORTER L. BUSH,
Notary Public.

[SEAL.]

PHS 1616 EVANSVILLE MH.
TREASURY DEPARTMENT,
Washington, August 17, 1935.

SUPERINTENDENT ST. ELIZABETHS HOSPITAL,
Washington, D. C.

SIR: By direction of the Secretary, you are hereby requested to receive into St. Elizabeths Hospital the person of Thomas Barry, a merchant seaman, transferred from U. S. Marine Hospital, Evansville, Indiana, to be cared for as prescribed by the Acts of Congress approved March 3, 1875, and July 1, 1918.

Respectfully,

[SEAL.] (Sgd.) JOSEPHINE ROCHE,
Assistant Secretary of the Treasury.

Certified to be a true copy.

P. M. LEHMAN,
Chief Clerk.

OPINION

Filed September 9, 1937

Habeas Corpus No. 1912

In re: THOMAS BARRY, Lunatic

I am satisfied that the patient, Thomas Barry, is still of unsound mind and in need of further care and treatment.

The writ of habeas corpus will be discharged and the petitioner returned to the custody of the respondent.

BAILEY, *Justice.*

ORDER DISCHARGING WRIT

Filed September 16, 1937

In the District Court of the United States for the
District of Columbia

Habeas Corpus No. 1912

In re: THOMAS BARRY

This cause came on to be heard upon the writ of habeas corpus, the petition, the return and answer thereto, and upon consideration thereof, and the evidence adduced in open court, it is, by the court, this 16th day of September 1937

ORDERED that the writ of habeas corpus heretofore issued herein be and the same is hereby discharged, the petition dismissed, and the petitioner remanded to the custody of the respondent.

JENNINGS BAILEY,
Justice.

From the above order the petitioner notes an appeal to the United States Court of Appeals for the District of Columbia.

JENNINGS BAILEY,
Justice.

DESIGNATION OF RECORD

Filed October 7, 1937

Habeas Corpus No. 1912

In re: THOMAS BARRY, Lunatic

The Clerk of the Court will please prepare a transcript of record in the above-entitled cause to consist of the following:

1. Affidavit of poverty.
2. Petition for a writ of habeas corpus.
3. Order.
4. Writ of habeas corpus.
5. Return and answer to petition of habeas corpus.
6. Opinion.
7. Order discharging writ, appeal.
8. Designation of Record.

THOMAS BARRY,
Petitioner.

DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, CHARLES E. STEWART, Clerk of the District Court of the United States for the District of Columbia, hereby certify the foregoing pages numbered from 1 to 13, both inclusive, to be a true and correct transcript of the record, according to directions of petitioner in the matter of Thomas Barry, Habeas Corpus No. 1912, as the same remains upon the files and of record in said Court.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 8th day of October 1937.

[SEAL] (Sgd.) C. E. STEWART, *Clerk.*

(27)

Mr. Linstrom

FILED

Michael

No. 7049

In the United States Court of Appeals
for the District of Columbia

OCTOBER TERM, 1937

THOMAS BARRY, APPELLANT

vs.

ROSCOE W. HALL, M. D., SUPERINTENDENT OF
ST. ELIZABETH'S HOSPITAL, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF COLUMBIA

BRIEF OF LAWRENCE KOENIGSBERGER
Amicus Curiae

INDEX

SUBJECT INDEX

	Page
Statement of the case-----	1
Summary of the argument-----	4
1. If U. S. C., Tit. 24, § 193, is construed to permit the detention of a civilian against his will, without prior notice and opportunity to be heard, it is unconstitutional, as violative of the due process clause contained in the Fifth Amendment to the Federal Constitution--	5
2. The statute should, if possible, be so construed as to be constitutional-----	15
3. The statute should not be construed to authorize the detention, against his will, of a civilian seaman in Saint Elizabeths Hospital upon the order of the Secretary of the Treasury, where such civilian has not been regularly adjudicated to be of unsound mind--	16
4. If the detention of the petitioner in Saint Elizabeths Hospital is unlawful he is entitled to be released on habeas corpus-----	19
5. If the petitioner is of unsound mind his further detention may be continued after proper proceedings have been had-----	22
Conclusion -----	25

TABLE OF CASES

<i>Allen, re</i> , 82 Vt. 365-----	10, 20, 25
<i>Allgor vs. N. J. State Hospital</i> , 80 N. J. Eq. 386-----	9, 20, 21
<i>Arthur C. Harvey Company vs. Malley</i> , 288 U. S. 415-----	3
<i>Boyett, re</i> , 136 N. C. 415-----	20
<i>Bryant, re</i> , 3 Mackey 489-----	13, 18, 20
<i>Butler vs. United States</i> , 297 U. S. 1-----	5
<i>Colby vs. Jackson</i> , 12 N. H. 526-----	25
<i>Den ex. dem. Murray vs. Hoboken Land and Improvement Co.</i> , 18 How. 272-----	13
<i>Eastman Kodak Company vs. Gray</i> , 292 U. S. 332-----	3
<i>Fleischmann Construction Company vs. United States</i> , 270 U. S. 349-----	3

II

	Page
<i>Florida vs. Mellon</i> , 272 U. S. 12.....	6
<i>Gannon, re</i> , 16 R. I. 537.....	11
<i>Hill vs. Wampler</i> , 298 U. S. 460.....	15
<i>Insurance Company vs. Tweed</i> , 7 Wall. 44.....	3
<i>Interstate Commerce Commission vs. Oregon-Washington Railroad & Navigation Company</i> , 288 U. S. 14.....	15
<i>Koshland vs. Helvering</i> , 298 U. S. 441.....	19
<i>Lehnen vs. Dickson</i> , 148 U. S. 71.....	3
<i>Logue vs. Fenning</i> , 29 App. D. C. 519.....	7
<i>Massachusetts vs. Mellon</i> , 262 U. S. 447.....	6
<i>Maxwell vs. Maxwell</i> , 189 Iowa 7.....	25
<i>Palmer vs. McMahon</i> , 133 U. S. 660.....	14
<i>Powell vs. Alabama</i> , 287 U. S. 45.....	8
<i>Porter vs. Rich</i> , 70 Conn. 235.....	25
<i>Public Clearing House vs. Coyne</i> , 194 U. S. 497.....	14
<i>Reaves vs. Ainsworth</i> , 219 U. S. 296.....	7
<i>Rookshaw vs. Hopkins</i> , 98 Engl. Reprint 627.....	25
<i>Russian Volunteer Fleet vs. United States</i> , 282 U. S. 481.....	15
<i>Shuttleworth, re</i> , 58 English Common Law Reports (N. S.) 650.....	20
<i>Simmon vs. Craft</i> , 182 U. S. 427.....	8, 13
<i>Supreme Council R. A. vs. Nicholson</i> , 140 Md. 472.....	13
<i>United States vs. Esnault-Pelterie</i> , 299 U. S. 201.....	3
<i>United States vs. LaFranca</i> , 282 U. S. 568.....	15
<i>United States vs. Jackson</i> , 280 U. S. 183.....	19
<i>United States ex rel. French vs. Weeks</i> , 259 U. S. 326.....	7
<i>Walters vs. McKinnis</i> , 221 Fed. 746.....	8, 20, 21
<i>Wellman, re</i> , 3 Kan. App. 100.....	13, 20
<i>White vs. Treibley</i> , 57 App. D. C. 238.....	6

TEXTS

<i>Bac. Abr. Trespass D.</i> 573.....	25
<i>Tiedeman on Police Powers</i> , 108.....	25

CONSTITUTIONAL PROVISIONS

Article 1, Section 8, Clause 1.....	5
Clause 3.....	5
Amendment 5.....	5
14.....	9, 11, 13

STATUTES, &c

Act of July 16, 1798 (1 Stat. 605).....	17
Act of March 3, 1875 (18 Stat. 486).....	2, 3
Act of July 1, 1918 (40 Stat. 644).....	2, 3
U. S. Code, Title 24, Section 1.....	16
26.....	16
191.....	6
193.....	3, 4, 5, 16

III

	Page
U. S. Code, Title 40, § 341-----	16
42, § 2-----	16
§ 6-----	16
R. S. U. S. 4843-----	6
4854-----	18
D. C. Code, Title 16, § 1-----	25
§ 18-----	25
§ 31-----	22
§ 32-----	22
§ 33-----	23
§ 34-----	24
§ 206-----	19, 20

**In the United States Court of Appeals
for the District of Columbia**

OCTOBER TERM, 1937

No. 7049

THOMAS BARRY, APPELLANT

vs.

ROSCOE W. HALL, M. D., SUPERINTENDENT OF
ST. ELIZABETHS HOSPITAL, APPELLEE

BRIEF OF LAWRENCE KOENIGSBERGER
Amicus Curiae

STATEMENT OF THE CASE

The case is before this Court on appeal from an order of the District Court of the United States for the District of Columbia, discharging a writ of habeas corpus issued against the respondent, the Superintendent of Saint Elizabeths Hospital for the Insane, dismissing the petition of appellant and remanding him to the custody of the respondent (R. 12-13).

It appears from the return and answer to the writ that the petitioner has been a patient in Saint Elizabeths Hospital since September 2, 1935, having been admitted thereto by transfer from the

United States Marine Hospital at Evansville, Indiana, pursuant to an order of commitment by the Secretary of the Treasury (R. 9).

The return and answer alleges that the petitioner is of unsound mind, and that two previous writs of habeas corpus previously sued out by him were discharged and the petitioner remanded to the custody of the respondent, on January 26, 1937, and July 27, 1937, respectively (R. 10).

There is attached to the writ and answer, as an exhibit, the document relied upon by the respondent as his authority for detaining the petitioner, the same consisting of a letter dated August 17, 1935, from an Assistant Secretary of the Treasury to the Superintendent of Saint Elizabeths Hospital, as follows:

By direction of the Secretary, you are hereby requested to receive into St. Elizabeths Hospital, the person of Thomas Barry, a merchant seaman, transferred from U. S. Marine Hospital, Evansville, Indiana, to be cared for as prescribed by the Acts of Congress approved March 3, 1875, and July 1, 1918 (R. 11).

The order of the Court below discharging the writ and dismissing the petition recites that the matter came on to be heard upon the writ, the petition, the return and answer thereto, and the evidence adduced in open Court (R. 12). As the evidence is not before this Court by bill of exceptions or otherwise, the only question open for considera-

tion by this Court is whether the order of the Court below can be sustained on the pleadings.

Fleischmann Construction Company vs. United States, 270 U. S. 349, 356.

Eastman Kodak Company vs. Gray, 292 U. S. 332, 337.

Arthur C. Harvey Company vs. Malley, 288 U. S. 415, 419.

The trial Justice filed an opinion in which he stated that he was satisfied that the petitioner was still of unsound mind and in need of further care and treatment (R. 12). This, however, is not the equivalent of a finding of fact.

Insurance Company vs. Tweed, 7 Wall. 44, 51.

Lehnen vs. Dickson, 148 U. S. 71, 77.

United States vs. Esnault-Pelterie, 299 U. S. 201, 206.

Enough appears from the pleadings to bring before this Court the question of the legality of the detention of the petitioner in said Saint Elizabeths Hospital, by virtue of the request of the Assistant Secretary of the Treasury under the statutes relied on, and the validity and proper construction thereof.

The statutes in question are the Acts of March 3, 1875 (18 Stat. 486), and of July 1, 1918 (40 Stat. 644), which will be found in U. S. C. Tit. 24, § 193, as follows:

Insane patients of the Public Health Service shall be admitted into Saint Elizabeths

Hospital upon the order of the Secretary of the Treasury, and shall be cared for therein until cured or until removed by the same authority. The Public Health Service shall pay to Saint Elizabeths Hospital the actual per capita cost of maintenance in the said hospital of patients committed by that service.

SUMMARY OF THE ARGUMENT

1. If U. S. C. Tit. 24, § 193, is construed to permit detention of a civilian against his will, without prior notice and an opportunity to be heard, it is unconstitutional, as violative of the due process clause contained in the Fifth Amendment to the Federal Constitution.

2. The statute should, if possible, be so construed as to be constitutional.

3. The statute should not be construed to authorize the detention, against his will, of a civilian seaman in Saint Elizabeths Hospital upon the order of the Secretary of the Treasury, where such civilian has not been regularly adjudicated to be of unsound mind.

4. If the detention of the petitioner in Saint Elizabeths Hospital is unlawful he is entitled to be released on habeas corpus.

5. If the petitioner is of unsound mind his further detention may be continued after proper proceedings have been had.

If U. S. C. Tit. 24, § 193, is construed to permit the detention of a civilian against his will, without prior notice and opportunity to be heard, it is unconstitutional, as violative of the due process clause contained in the Fifth Amendment to the Federal Constitution

Under the broad interpretation of the general welfare clause (Article I, § 8, clause 1) of the Constitution adopted by the Supreme Court of the United States in *Butler vs. United States*, 297 U. S. 1, 65, it is probably not open to question that Congress may appropriate public funds for the care and treatment of sick and disabled seamen, aside from its power to regulate interstate commerce (Article I, § 8, clause 3); but when such benefits take the form of a forcible detention of the person sought to be benefited, infringement of the due process clause of the Fifth Amendment must be avoided. The Federal Government has no greater power in respect of the person of a seaman than it has over the person of any other civilian, and this principle applies *a fortiori* to the case of a former seaman, as is the petitioner. There is nothing in the grant of power to the Federal Government under the Constitution which makes it *parens patriae* of seamen or of any other class of persons, whether sane or insane, except where some special relation between them and the Federal Government exists—*e. g.*, members of the armed forces, Indians, and residents of the District

of Columbia. The statements in *Massachusetts vs. Mellon*, 262 U. S. 447, 485-486, and *Florida vs. Mellon*, 272 U. S. 12, 18, cited in the brief for respondent (p. 5), that the United States represents its citizens when such representation becomes appropriate in respect of their relations to the Federal Government, do not mean that the Federal Government may take any class of citizens under its protecting wing at its pleasure.

White vs. Treibley, 57 App. D. C. 238, is not authority for the holding of a civilian seaman in Saint Elizabeths Hospital without a hearing and against his will. That case involved a retired officer of the Navy who had been committed to Saint Elizabeths Hospital under the provisions of R. S. U. S. 4843 (U. S. C. Tit. 24, § 191, par. 1), which provides, *inter alia*, that the Superintendent, upon the order of the Secretary of the Navy, shall receive and keep in custody until they are cured, or removed by the same authority which ordered their reception, insane persons belonging to the Navy. This Court held that a retired officer of the Navy is in the military service of the Government, and, as such, subject to the orders of the Secretary of the Navy in like manner as any other member of the military service; and that the commitment of the retired officer to the Hospital was valid as an order by competent naval authority. The opinion is based entirely on the point that the retired officer was a part of the naval establishment. To those in

the military or naval service of the United States the military law is due process.

Reaves vs. Ainsworth, 219 U. S. 296, 304.

United States ex rel. French vs. Weeks, 259 U. S. 326, 335.

It plainly appears from the return and answer to the writ that the petitioner is held in custody solely by virtue of the letter addressed to the Superintendent of the Hospital by the Assistant Secretary of the Treasury (R. 9). It is nowhere alleged on behalf of respondent that the petitioner was given any notice prior to the writing of the letter, that any hearing was had, or that the petitioner was accorded an opportunity to be heard. It cannot be presumed that there was any such notice, hearing, or opportunity to be heard, as neither the statute nor the regulations make provision therefor.

There is thus presented the question whether, under the constitutional guarantee of due process of law, a civilian may be committed to, and confined in, a hospital for the insane without prior notice and without an opportunity to be heard in his defense, for, while the commitment of an insane person is not in any sense a criminal proceeding, it is nevertheless a deprivation of liberty.

The necessity for notice was recognized by this Court in *Logue vs. Fenning*, 29 App. D. C. 519. In that case a person confined in Saint Elizabeths Hospital contended that he had not had sufficient

notice of the inquiry as to his lunacy. This Court held (p. 525) that, conceding that due process of law requires notice to, and opportunity to be heard by, the party against whom a proceeding to inquire of his lunacy has been instituted, nevertheless in that case the notice given was sufficient, although it was given on the day of the hearing and prior thereto. It may be doubted whether in view of the holding of the Supreme Court of the United States in *Powell vs. Alabama*, 287 U. S. 45, 71, this would now be held to have been reasonable notice, but that question is not here under consideration, since no notice whatever was given in the instant case.

In *Simmon vs. Craft*, 182 U. S. 427, the Supreme Court of the United States assumed without discussion that in a lunacy proceeding it was necessary that the alleged lunatic be given notice of the proceedings and an opportunity to defend, although holding that in that case the notice and hearing had been sufficient.

The courts of many States have held that it is a violation of due process of law to restrain a person of his liberty as a lunatic without prior notice and hearing.

In *Walters vs. McKinnis* (D. C. W. D. Pa.) 221 Fed. 746, a woman, pursuant to the Pennsylvania statute, had been committed to a hospital for the insane while under a criminal charge upon the certificate of two physicians that she was insane. The

statute made no provision for notice or hearing, and the Court held the proceedings to be violative of the Fourteenth Amendment to the Constitution, saying (p. 750) :

That the relator was committed to the asylum without due process of law would seem to be clear, both on principle and under the authorities. The right to notice and a hearing, and an opportunity to defend, before one can be deprived of his liberty, which is one of the greatest natural rights of man, would seem to be a fundamental proposition based on natural justice.

* * * * *

It would be hard to imagine an act of assembly, perhaps conceived in humanitarian motives, which so completely ignores every safeguard for the protection of the liberty of the citizen.

Allgor vs. N. J. State Hospital, 80 N. J. Eq. 386, arose on a habeas corpus sued out on behalf of Allgor, who was confined in the State asylum for the insane. The statute provided that no person should be confined in any institution for the insane except upon filing with the medical director of an application in writing of a person interested in his admission, to which were required to be attached the certificates of two physicians under oath; and that no person so confined should be held in confinement for more than fifteen days unless the applicant should within that time present to the justice of the Supreme Court presiding in the court of the county

of the confined person's residence said application and certificates and that such justice, in his discretion might institute an inquiry and take proofs as to the insanity of the person so confined, and might in his discretion call in a jury for the determination of that fact. The Court said (p. 393) :

* * * it will not fail to be observed that there is no requirement upon anybody's part to present the matter to any judge or court. There is no opportunity whatever afforded the so-called insane person or anyone on his behalf; but the "interested person" or applicant for the admission has the choice of presenting the same to a judge or refraining if he sees fit. In my view it would be a sheer waste of time to discuss the question as to whether this could by any stretch of language or thoughts be considered "due process of law." There is no process of law about it. Thus construed the statute becomes an undue method of depriving persons of their liberty without anything resembling a legal proceeding being invoked. I cannot conceive it possible that such an act (so construed) would be a valid law under the 14th Amendment to the Constitution of the United States.

Re *Allen*, 82 Vt. 365, arose under a statute which provided that no person, with certain exceptions, should be admitted to or detained in a hospital for the insane except upon a certificate of insanity made by two physicians. The statute contained no provision for notice to the alleged incompetent.

The Court held that, since a commitment without a hearing would be violative of due process, the statute should be so construed as to entitle the alleged insane person to proper notice of the proceedings and an opportunity to be present and defend, and that, if so construed, the statute was constitutional but that in the case there under consideration it did not appear that any notice had in fact been given, and that therefore the proceedings were a nullity and the petitioner was unlawfully deprived of her liberty.

In *re Gannon*, 16 R. I. 537, was a petition for habeas corpus presented on behalf of a person confined in a hospital for the insane pursuant to the provisions of a statute which provided for commitment upon a certificate of two physicians. The statute also provided that the person so confined might be discharged upon the application of any relative or friend, with the approval of the visiting committee of trustees of the institution, or upon a finding of the commission appointed by a justice to inquire into the question of sanity and report thereon and by the act of the justice on such report. The statute did not provide for notice of the pendency of such inquiry before the commission.

It was held that the statute was violative of the Fourteenth Amendment to the Federal Constitution, as depriving the person confined of his liberty without due process of law, the Court saying (p. 538):

Without attempting to define the exact meaning of the phrase "due process of law," it suffices for the present inquiry to say that it means at least some legal procedure in which the person proceeded against, if he is to be concluded thereby, shall have an opportunity to defend himself.

Independently of statutes, every person is entitled to his day in court, and to the right to be heard before he is condemned. No mere ex parte proceeding can affect either personal or property rights. * * * Notice and opportunity to be heard lie at the foundation of all judicial procedure. They are fundamental principles of justice, which cannot be ignored. Without them no citizen would be safe from the machinations of secret tribunals, and the most sane member of the community might be adjudged insane, and landed in a madhouse. It will not do to say that it is useless to serve notice upon an insane person—that it would avail nothing, because of his inability to take advantage of it. His sanity is the very thing to be tried. At the threshold of the inquiry, the court is supposed to have no knowledge of the mental condition, but the presumption of the law is in favor of sanity. Insanity, like crime, does not exist, in law, until it is established by evidence in a proper proceeding. A trial without notice—a mere ex parte proceeding—has no proper place in a court of justice. It is a nullity and void, as affecting those not parties to it.

 In re *Wellman*, 3 Kan. App. 100, 45 P. 726.

It is difficult to over-estimate the gravity and seriousness of the consequences to the citizen which necessarily flow from an adjudication declaring him to be *non compos mentis*. He is divested of his property, and may be restrained of his liberty, and incarcerated in an insane asylum. To assert that this can be done, under the general principles of American law, without notice or opportunity to be heard, is shocking to one's sense of justice and humanity.

Supreme Council R. A. vs. Nicholson, 104 Md. 472, 479.

The Supreme Court of the District of Columbia in general term held in re *Bryant*, 3 Mackey 489, 493, that due process of law in establishing the insanity of a person has long been declared to be by inquiry through a jury, but this is probably overruled by the principle of *Simmon vs. Craft*, 182 U. S. 427, in which it was held that the due process clause of the Fourteenth Amendment does not necessitate that the proceedings in a State court should be by a particular mode, but only that there shall be a regular course of proceedings in which notice is given of the claim asserted, and an opportunity afforded to defend against it.

Although it is not in all cases necessary to due process that there shall be a hearing before a judicial tribunal (*Den ex dem. Murray vs. Hoboken*

Land and Improvement Co., 18 How. 272; ~~*Palmer*~~ vs. *McMahon*, 133 U. S. 660; *Public Clearing House* vs. *Coyne*, 194 U. S. 497), it is not necessary for the determination of this case to decide whether the commitment of petitioner would have been valid if made by the Secretary of the Treasury after due notice and hearing, as the statute makes no provision for a hearing nor for any finding of fact by the Secretary of the Treasury that the person to be committed is of unsound mind, the statute providing merely that patients of the Public Health Service shall be received by the Superintendent of Saint Elizabeths Hospital upon the request of the Secretary of the Treasury. The Regulations of the Public Health Service contain no provision for any hearing or findings of fact, but, on the contrary, § 508 cited in the brief for respondent (p. 7), expressly provides that a patient believed to be insane and a menace to himself or others, may be taken before a competent local authority and that, "If *adjudged* insane," appropriate recommendations shall be made for transfer to a special institution for treatment. It is therefore believed not advisable to discuss the question of whether the Secretary of the Treasury may, under existing law, conduct a hearing to determine the mental state of patients of the Public Health Service, unless and until he shall undertake to do so.

The argument is made on behalf of the respondent that an insane person is not held or detained in the hospital by virtue of the commitment, but

by virtue of the judgment or verdict of the court, board, or commission. There is no statement in the answer that there has been any judgment or verdict of any court, board, or commission. If there had been, the case of *Hill vs. Wampler*, 298 U. S. 460, would be applicable. Where there has been a judgment, after the requirement of due process has been complied with, it is that judgment which affords legal justification for the detention; but where, as in this case, the answer of the respondent shows that he bases his claim of right to detain upon the order of the Secretary of the Treasury, it cannot be presumed that there has been any finding by any court, commission, or board; nor that there has been any hearing or finding by the Secretary or Assistant Secretary or any other officer, particularly where the statute does not expressly require such hearing or finding.

2

The statute should, if possible, be so construed, as to be constitutional

It is the duty of the courts to construe a statute, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score.

Interstate Commerce Commission vs. Oregon-Washington Railroad & Navigation Company, 288 U. S. 14, 40.

United States vs. LaFranca, 282 U. S. 568, 574.

Russian Volunteer Fleet vs. United States, 282 U. S. 481, 492.

The statute should not be construed to authorize the detention, against his will, of a civilian seaman in Saint Elizabeths Hospital upon the order of the Secretary of the Treasury, where such civilian has not been regularly adjudicated to be of unsound mind

The Public Health Service is under the jurisdiction of the Treasury Department (U. S. C. Tit. 42, § 2), and among its duties are the care of sick and disabled seamen (U. S. C. Tit. 42, § 6). The Secretary of the Treasury is authorized to provide hospital facilities for the care and treatment of merchant marine seamen (U. S. C. Tit. 24, § 26), which term is defined to include any person employed on board in the care, preservation, or navigation of any vessel, or in the service, on board, of those engaged in such care, preservation, or navigation (U. S. C. Tit. 24, § 1). The Secretary of the Treasury is authorized to cause marine hospitals to be constructed at such locations as he may consider advisable (U. S. C. Tit. 40, § 341).

U. S. C. Tit. 24, § 193, relied upon by respondent as his authority for detaining petitioner, provides that—

Insane patients of the Public Health Service shall be admitted into Saint Elizabeths Hospital upon the order of the Secretary of the Treasury, and shall be cared for therein until cured or until removed by the same authority.

This section is readily susceptible of the interpretation that it was the intent of Congress to confer upon seamen the privilege of being treated at Saint

Elizabets Hospital, without giving to the Secretary of the Treasury the power, without notice and hearing, and without an adjudication, to cause them to be detained there against their will. Congress from the early days of the Nation has shown a tender regard and consideration for sick and disabled seamen. This was evidenced as early as 1798 when, by the Act of July 16, 1798, § 4 (1 Stat. 605) provision was made for hospitals for the accommodation of sick and disabled seamen, and subsequent legislation has continued and enlarged such provisions. Nothing in the statute compels an interpretation authorizing Governmental beneficence to be forced upon those who do not desire it.

The expression in the statute that patients of the class of petitioner shall be cared for in Saint Elizabeths Hospital "until cured or until removed by the same authority" (the Secretary of the Treasury) should be construed to mean that such patients are not entitled to such treatment after they are cured or after the Secretary of the Treasury causes them to be removed—instead of that they may be compelled to remain there until they are cured or ordered removed by that official.

If the statute be construed as imposing upon the authorities of the Hospital the duty of caring for insane patients of the Public Health Service when ordered so to do by the Secretary of the Treasury, without importing into the statute the right or power so to care for them against their

will, and in the absence of an adjudication, no Constitutional objection is encountered.

In re *Bryant* arose under R. S. U. S. 4854, which provided that independent or pay patients may be received into the hospital for the insane on the certificate of two respectable physicians of the District, stating that they have personally examined the patient and believe him to be insane and a fit subject for treatment in the institution, accompanied by a written request for the admission from the nearest relatives, legal guardian, or friend of the patient, where he may remain until restored to reason, and that the friends of the patient shall comply with the regulations of the hospital in respect to payment of board. The Court said (p. 493):

We do not think that there is anything in the language of the statute which gives any power of compulsory seclusion without due process of law. It opens the doors of this asylum and nothing more. It simply permits its use for an insane person—a pay patient—and means no more than if the statute had prescribed the rate of boarding for such persons.

It is, therefore, submitted that the proper interpretation of the statute is that patients of the Public Health Service shall be cared for at Saint Elizabeths Hospital (1) with their consent and during such period of time as shall be authorized by the Secretary of the Treasury; and (2) with or with-

out their consent, by direction of the Secretary of the Treasury, if they have been regularly adjudicated to be of unsound mind.

As to the second of these alternatives § 508 of the Regulations for the Government of the United States Public Health Service clearly implies an administrative interpretation that persons believed to be insane and a menace to themselves and others should be taken before competent local authority before being committed to institutions. Such administrative interpretations of statutes are entitled to great weight.

United States vs. Jackson, 280 U. S. 183, 193.

Koshland vs. Helvering, 298 U. S. 441, 445.

4

If the detention of the petitioner in Saint Elizabeths Hospital is unlawful he is entitled to be released on habeas corpus

District of Columbia Code, Tit. 24, § 206, provides that if on the return of the writ of habeas corpus the court or justice shall deem the detention of the petitioner to be without legal warrant or authority he shall immediately be released or discharged.

The following cases hold that where the detention of persons as insane is found to be illegal they are entitled to be released on habeas corpus regard-

less of the question of whether or not they are in fact of unsound mind.

Walters vs. McKinnis, 221 Fed. 746.

Allgor vs. New Jersey State Hospital, 80 N. J. Eq. 386.

In re *Wellman*, 3 Kan. App. 100.

In re *Bryant*, 3 Mackey 489.

As opposed to this view there may be cited the following cases which hold that if the court believes the petitioner to be insane, it may order his temporary detention pending proper proceedings to determine his sanity.

Re *Boyett*, 136 N. C. 415 (insane criminal).

In re *Allen*, 82 Vt. 365, 381 (if the court has reason to believe the person insane and dangerous).

In re *Shuttleworth*, 58 English Common Law Reports (N. S.) 650 (if person believed to be dangerous).

It is submitted, however, that these cases should not be followed in this jurisdiction in view of the express mandate contained in D. C. Code, Tit. 24, § 206, above referred to, and particularly in view of the applicable statutes which seem fully to cover this contingency, hereinafter summarized.

Even if it be assumed from the record in this case that the petitioner is of unsound mind and that the trial Justice so found upon competent evidence adduced before him, nevertheless the vice in the commitment is not thereby cured. A writ of

habeas corpus cannot be made the means of adjudicating a person to be of unsound mind. If the commitment is void, the petitioner is entitled to be discharged upon a writ of habeas corpus regardless of whether, in a proper proceeding, he would be re-committed.

She [relator] is imprisoned by virtue of proceedings under an act of assembly of a state, which has deprived her of her liberty without due process of law. The proceedings are not simply voidable, but absolutely void, and against such void proceedings, under all the authorities, habeas corpus will grant relief.

The court is not passing here on the question of the relator's sanity, but on the question of the legality of the proceedings by which she is confined in the asylum; and inasmuch as I am of the opinion that her incarceration is in violation of her rights under the national Constitution I do not feel at liberty under the facts and the law of the case, to deny her prayer for relief, addressed to the federal tribunal.

Walters vs. McKinnis (D. C., W. D. Pa.)
221 F. 746, 754.

To the same effect is—

Allgor v. New Jersey State Hospital, 80
N. J. Eq. 386, 393.

If the petitioner is of unsound mind his further detention may be continued after proper proceedings have been had

If in the instant case this Court should reverse the action of the Court below, and order the petitioner discharged, it does not follow that if he ought to be detained he must forever after remain at large.

D. C. Code, Tit. 16, § 31, provides that any member of the police force of the District of Columbia or other authorized officer in the District authorized to make arrests, may apprehend and detain without warrant any person of unsound mind found in any public place within the District of Columbia and that such officer shall thereupon immediately file an affidavit with the major and superintendent of police that he believes such person to be insane or of unsound mind, incapable of taking care of himself or of his property, and that the rights of persons and property will be jeopardized or the preservation of public peace and the commission of crime rendered probable if such person is permitted to remain at large; and it shall thereupon be the duty of the major and superintendent of police forthwith to notify the husband or wife, or some near relative or friend, of the person so apprehended.

Section 32 authorizes the major and superintendent of police to order the apprehension and

detention without warrant of any indigent person alleged to be of unsound mind or any alleged insane person of homicidal or otherwise dangerous tendencies found in the District of Columbia in places other than public places, whenever two or more responsible residents of the District shall make and file affidavits with him that they believe such person to be of unsound mind, that they believe such person to be incapable of managing his own affairs, that he is not fit to be at large, and that if such person is permitted to remain at liberty in the District of Columbia, the rights of persons and of property will be jeopardized or the preservation of public peace imperiled, and the commission of crime rendered probable, and that such person is a fit subject for treatment on account of his mental condition, with the requirement that before ordering such apprehension and detention the major and superintendent shall require the certificate of at least two physicians.

Section 33 authorizes the Commissioners of the District of Columbia to place in Saint Elizabeths Hospital for not more than thirty days indigent persons alleged to be insane or of unsound mind, resident of or found within the District, and alleged insane persons of homicidal or otherwise dangerous tendencies, residents of or found within the District, apprehended and detained as provided in sections 31 and 32, pending formal commitment, or their transportation to their homes when their

places of residence are ascertained by the proper officials charged by law with that duty.

Section 34 provides that the Commissioners of the District of Columbia may authorize the temporary commitment of any of the insane persons or persons of unsound mind mentioned in Sections 31, 32, and 33, and apprehended and detained as provided in Sections 31 and 32 (for not more than thirty days) in any other hospital in the District which in the judgment of the health officer of the District is properly constructed and equipped for their care and the official in charge whereof is willing to receive them pending temporary commitment or formal commitment to Saint Elizabeths Hospital; or that any such person may be detained in any police station or house of detention pending completion of arrangements for his temporary detention, in Saint Elizabeths Hospital or any other hospital or insane asylum: provided, that if, pending a formal commitment the Superintendent of Saint Elizabeths Hospital or one or more physicians in regular attendance at such other hospital, or two or more surgeons of the police or fire departments, shall certify in writing that such person is not insane, such person shall be released and report thereof made to the Commissioners of the District of Columbia.

The right temporarily to detain, pending hearing, insane persons of dangerous tendencies, existed at common law prior to the adoption of the

Constitution, is now well recognized, and is not violative of due process.

Rookshaw vs. Hopkins (1790), 98 Eng. Reprint, 627.

Bac. Abr. Trespass D. 573.

In re Allen, 82 Vt. 365.

Colby vs. Jackson, 12 N. H. 526, 530.

Porter vs. Rich, 70 Conn. 235, 255.

Tiedeman on Police Powers, 108.

Maxwell vs. Maxwell, 189 Iowa, 7.

D. C. Code, Tit. 16, §§ 18 and 1, provide that proceedings to determine the mental condition of alleged indigent insane persons and persons alleged to be insane, with homicidal or otherwise dangerous tendencies, shall be instituted upon petition of the Commissioners of the District of Columbia, and that the proceedings shall be in the equity court with trial by jury.

It will thus be seen that existing statutes make ample provision for further proceedings in the event of the release of petitioner on the writ of habeas corpus by reason of the illegality of his detention.

CONCLUSION

In conclusion, it is respectfully submitted:

1. That the petitioner is illegally detained, having been committed to Saint Elizabeths Hospital without having been accorded due process of law.
2. That he is entitled to be released on the writ of habeas corpus.

3. That the public interest and his own best interests can be adequately protected if he is released, and such further proceedings as may be necessary and as are authorized by law are thereafter had.

Respectfully submitted.

LAWRENCE KOENIGSBERGER,

*Amicus curiæ, appointed by order passed
herein November 23, 1937.*

No. 7049

**In the United States Court of Appeals
for the District of Columbia**

OCTOBER TERM, 1937

THOMAS BARRY, APPELLANT

v.

ROScoe W. HALL, M. D., SUPERINTENDENT OF ST. CLERK
ELIZABETHS HOSPITAL, APPELLEE

BRIEF IN REPLY TO AMICUS CURIAE

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ELIZABETHS HOSPITAL, APPELLEE

BRIEF IN REPLY TO AMICUS CURIAE

STATEMENT OF THE CASE

This is an appeal from an order of the District Court of the District of Columbia discharging a writ of habeas corpus issued out of said court on August 30, 1937, and concerning the commitment of Thomas Barry, the appellant herein, petitioner below, by the Secretary of the Treasury.

It appears that the petitioner has been a patient in St. Elizabeths Hospital since September 2, 1935, having been admitted in said hospital by transfer from the United States Marine Hospital at Evansville, Indiana, under authority of the Secretary of the Treasury.

The return and answer states that the petitioner is of unsound mind, and that two previous writs of habeas corpus sued out by him on January 26, 1937, and July 27, 1937, were discharged and the petitioner remanded to the respondent.

Attached to the writ and answer is the letter of the Secretary of the Treasury, dated August 17, 1935, addressed to the Superintendent of St. Elizabeths Hospital, which is as follows:

By direction of the Secretary, you are hereby requested to receive into St. Elizabeths Hospital, the person of Thomas Barry, a merchant seaman, transferred from U. S. Marine Hospital, Evansville, Indiana, to be cared for as prescribed by the Acts of Congress approved March 3, 1875, and July 1, 1918.

The District of Columbia was permitted by this Honorable Court on January 17, 1938, to file a brief in reply to the brief of the amicus curiae within ten days therefrom.

The District of Columbia is interested in the outcome of this case for the reason that at the present time there are in St. Elizabeths Hospital, 3,900 patients, who are maintained at the expense of the District of Columbia; 1,500 patients, service and former service men, who are maintained at the expense of the War Department, Navy Department, and Veterans' Bureau; 136 patients, including merchant seamen, lighthouse keepers, ship's

cooks, merchant ship engineers, etc., who are maintained at the expense of the Public Health Service; and 275 other patients, including all classes of prisoners, who are maintained by the United States Government. The cost of maintaining these patients is at the rate of \$1.80 per day. At this rate the cost to the District of Columbia each year is \$2,562,300.00; the cost to the War Department, Navy Department, and Veterans' Bureau is \$985,500.00; the cost to the Public Health Service is \$89,352.00; the cost to the United States Government for other patients is \$180,675.00; and the total cost amounts to \$3,815,827.00. Of this total cost the District of Columbia is now paying approximately 67%.

In the brief of amicus curiae it is pointed out that if the petitioner is of unsound mind his further detention may be continued after proper proceedings have been had, reference being made to the District of Columbia Code, Title 16, Sections 31, 32, 33, and 34, which provide for the commitment of insane persons in the District of Columbia by the District of Columbia Commissioners.

The case of Thomas Barry, petitioner, shows that he is a nonresident of the District of Columbia and probably, by the very nature of his work in the merchant marine service, has no fixed place of provable residence. Should the District of Columbia be called upon to adjudicate Thomas Barry in accordance with above mentioned sections of the District of Columbia Code, and the District of Colum-

bia, necessarily through the Commissioners, order his reception into St. Elizabeths Hospital, the District of Columbia would be called upon to pay for the board and care of said patient. Thus, it will be seen that the already exorbitant financial burden may be greatly increased by the allowance of the writ of habeas corpus in this case and the many others of similar facts. The taxpayers of the District of Columbia have serious concern in the determination of the question involved in this appeal.

The principal and important question in this case appears to be: *Has the Petitioner Been Denied Due Process of Law?*

Thomas Barry, the petitioner, was sent to St. Elizabeths Hospital on September 2, 1935, from the United States Marine Hospital at Evansville, Indiana, on order of the Secretary of Treasury in accordance with the Act of March 3, 1875 (18 Stat. 486), and of July 1, 1918 (40 Stat. 644), which will be found in U. S. C., Tit. 24, Sec. 193, and which reads as follows:

Insane patients of the Public Health Service shall be admitted into Saint Elizabeths Hospital upon the order of the Secretary of the Treasury, *and shall be cared for therein until cured or until removed by the same authority.* The Public Health Service shall pay to Saint Elizabeths Hospital the actual per capita cost of maintenance in the said

hospital of patients committed by that service. [Italics supplied.]

The petitioner appeared before the District Court of the United States on *January 26, 1937, July 27, 1937*, and again on *August 30, 1937*, on writs of habeas corpus, all of which have been discharged.

In the case of *Ex Parte Elias Dagley*, 44 L. R. A. (N. S.) 389, decided by the Oklahoma Supreme Court, the court, in referring to the commitment of an insane person, made the following observation:

* * * Therefore, for the purpose of this proceeding, it is admitted that Mrs. Amanda Dagley is now insane. Such being her condition, she is not entitled, as a matter of right, to be discharged, when the ground alone is that she is held under a void statute.

In *Denny v. Tyler*, 3 Allen, 225, it is said: "The infirmity of the argument urged by the learned counsel in support of the writ consists in assuming that the abstract truth that no one can be deprived of his liberty or imprisoned against his will is of universal application, and that this court is bound to interpose and discharge all persons who are subjected to any restraint which is not imposed by the judgment of their peers or the law of the land. But the great truth on which this argument is based like all general rules and principles, is subject to many qualifications and limitations. Taken in its literal sense, it would render unlawful the restraint of a person under the delirium of a fever or in the paroxysm of a fit. Applied

without reference to the paramount law of necessity and humanity, it would render impracticable the performance of many of the duties of domestic and social life. It is therefore to be taken with due limitations, and to be construed in a reasonable manner with reference to the practical concerns of life and the circumstances of each particular case. It certainly can have no legitimate application where it is shown that the person who is alleged to be in prison or restrained of his liberty is insane. In the eye of the law, such person has no will. He cannot be said to be capable of exercising an act of volition. In determining on his right to be set free from restraint, his will cannot, as in case of a sane person, be made a test by which to ascertain the legality of the custody which is claimed over him. The law in such case can look only to the question whether the restraint to which he is subjected is unnecessary and unreasonable; and, if it is ascertained that it is not, then the judgment must be that the restraint is not illegal, because it is only such as sound reason and an intelligent will sanction and approve."

In the case of *In re Dowdell*, 169 Mass. 387, 61 Am. St. Rep. 290, 47 N. E. 1033, the court said:

The only ground for the petitioner's discharge which is set forth in the petition or relied on in argument is that the provisions of statute under which he was committed are unconstitutional as being in violation of Article 12 of the Declaration of Rights and of

the 14th Amendment of the Constitution of the United States. The former provides that no subject shall be deprived of his liberty but by the judgment of his peers or of the law of the land; the latter that no State shall deprive any person of liberty without due process of law. So far as the Declaration of Rights is concerned, it has been twice determined that a person who is in fact insane is not entitled to be discharged from a hospital on habeas corpus, provided the court is satisfied that the restraint and treatment there will be beneficial to him. *Re Oaks* (1845) 8 Law Rep. 122; *Denny v. Tyler*, 3 Allen, 225. In both of these cases the person was committed without any previous hearing and without the order of the judge.

In the instant case, it must be assumed from the record that the petitioner is in fact insane and that the restraint and treatment at St. Elizabeths Hospital is beneficial to him. The case, therefore, comes within the decision, *supra*, and the following authorities support this rule:

Re Boyett, 136 N. C. 415, 67 L. R. A. 972, 103 Am. St. Rep. 944, 48 S. E. 791, 1 Ann. Cas. 729.

Rex v. Coate, Lofft, 73-76.

Brookshaw v. Hopkins, Lofft, 254.

Re Shuttleworth, 9 Q. B. 651, 2 New Sess. Cas. 470, 16 L. J. Mag. Cas. N. S. 18, 11 Jur. 41.

Rex v. Gourlay, 7 Barn. & C. 669, 1 Moody & R. 619, 31 Revised Rep. 276.

Anderson v. Burrows, 4 Car. & P. 210.

- Rex v. Turlington*, 2 Burr. 1115.
Rex v. Clarke, 3 Burr. 1362.
Scott v. Wakem, 3 Fost. & F. 328.
Symm v. Fraser, 3 Fost. & F. 859.
Hall v. Semple, 3 Fost. & F. 337.
Fletcher v. Fletcher, 1 El. & El. 420, 28
 L. J. Q. B. N. S. 134, 5 Jur. N. S. 678, 7 ✓
 Week. Rep. 187.
Ex parte Greenwood, 24 L. J. Q. B. N. S. ✓
 148, 1 Jur. N. S. 522.
Denny v. Tyler, 3 Allen, 225.
Look v. Dean, 108 Mass. 116, 11 Am. Rep.
 323.
Colby v. Jackson, 12 N. H. 526.
Davis v. Merrill, 47 N. H. 208.

In the case of *Hammon v. Hill*, 228 Fed. 999, the court in its opinion said:

Nothing can be clearer than the duty of the state to restrain and confine the insane, not only for their own safety and protection, but for the safety and protection of the public. The relation between the two is that of guardian and ward. The confinement in an asylum is not of the same character as imprisonment for the punishment of an offense. It is a necessity growing out of the inability of the mentally afflicted to care for themselves or prevent injury to others. The state restrains the lunatic, not only for his own protection and the safety of the public, but its duty extends so far as to include every provision known to medical skill and science for the treatment of the diseased mind. Thus the work of the state in caring for the demented within her borders is at

once protected in its character and highly humanitarian.

It is also true that, by reason of the character of the malady with which the insane is afflicted, the same course of procedure cannot be employed for their restraint, as in the case of those who are *compos mentis*. Notice or a hearing to the insane man is a vain thing, and frequently the exigency of the case is such as to call for immediate restraint to protect himself and others from his violent and unreasonable conduct.

In Volume 12, *Corpus Juris*, Section 987, page 1211, certain notes appear at the bottom of the page which clearly indicate that it is the universal policy to immediately hospitalize a person of unsound mind for his own protection and that of the community without any particular formal legal procedure with the qualification that some judicial process be available to him (*Habeas Corpus*) at a time when it may be used with safety and propriety.

Reason for rule.—Insanity is a disease, and the state has the right to treat one who has the misfortune to suffer from it, as it does one who has a contagious malady. The exercise of this right of self protection must be regulated by the circumstances of the case. If it is dangerous to the community that a citizen should go at large, whether because he is liable to spread contagion or to commit some act of violence, public safety demands that he be immediately confined, either with or against his will, and the extent of his personal right can only be to test by judicial

process, at a time when it may safely be done, the propriety of his restraint. *In re Crosswell*, 28 R. I. 137, 144, 66 A 55, 13 Ann. Cas. 874.

In 14 Ruling Case Law, in the note on page 563, it is stated that in some jurisdictions it has been declared that a statute providing for the commitment of a person to an insane asylum without notice or hearing is not unconstitutional where under such statute the person committed or anyone in his behalf may after commitment have the necessity of the restraint inquired into by a judicial tribunal. Such opportunity to have a judicial inquiry is deemed in effect to constitute due process of law.

While it may be conceded that in most, if not in all of the cases above cited, a statute authorized the testing by habeas corpus of the sanity of one confined in an institution, it has been held by this court that, in this jurisdiction, the same function may be performed by a petition for that writ in the absence of statute. In the case of *Wagner v. White*, 38 App. D. C. 554, one Wagner had been convicted of crime, but had been committed to Saint Elizabeths Hospital upon a finding of insanity. The statute under which he was committed provided that, upon the recovery of the person committed, the superintendent of the hospital should certify that fact and deliver such person to the Court. It contained no provision respecting the procedure to be followed in the event such person should be restored to sanity but the superintendent fail to so certify. This

Court held the sanity of such person could then be tested by habeas corpus saying:

* * * If the court should be advised that the prisoner, committed to the hospital to remain while insane, had been restored to sanity, and that the officer in charge has failed to certify to the fact, we are not prepared to say that it might not cause the prisoner to be produced and judicial inquiry made to ascertain the fact; nor, if found to be restored to sanity, it might not proceed to sentence him in accordance with the verdict. But that question is not directly involved. On the other hand, the section does not provide that the restored sanity of the prisoner shall not be ascertained in any other way. If it expressly committed the matter exclusively to the voluntary exercise of the discretion of the superintendent, it might be subject to the objection urged. But we find in it nothing that precludes the right of the prisoner to have a judicial inquiry made into the fact of restoration to sanity. If the prisoner's friends have reason to believe that he has been restored to sanity, and is therefore no longer subject to restraint and treatment in the hospital for the insane, they would be entitled to a writ of habeas corpus to compel his production before a court where due inquiry could be had. * * *

In the case of *In re John T. Cover*, Alleged Lunatic, decided by Mr. Justice Stafford in the then Supreme Court of the District of Columbia, 37

W. L. R. 785, it appeared that a prisoner in the United States penitentiary at Atlanta had been committed to Saint Elizabeths Hospital by the Secretary of the Interior without an adjudication of insanity in any court. After his term of imprisonment had expired, he filed a petition for a writ of habeas corpus. In denying the writ, the court said:

* * * It seems clear that the right of the petitioner to be released either upon writ of habeas corpus, or otherwise, depends upon the question whether he is restored to sanity, or in other words, whether he is now of sound mind. * * *

It will be noted that the statute involved in this appeal only authorizes the detention of the person committed thereunder "until cured." Hence it follows that if such person becomes "cured," his detention becomes illegal, under the statute, and there would seem to be no question but that he would be entitled to his release by writ of habeas corpus. This removes all possibility of a person being detained without an opportunity for a hearing upon the question of his sanity.

Some light is thrown upon the question involved in this case in the decision of this Court in *United States v. Frizzell*, 19 App. D. C. 48, which case, however, did not involve the issuance of a writ of habeas corpus but did involve the question of whether a soldier committed to Saint Elizabeths Hospital by the Secretary of War under a statute similar to the one here relied upon could be re-

quired to pay for his keep after his enlistment was at an end. This Court held that no charge could be made against him for his board since he had been committed to this institution until "cured or removed" by the Secretary of War. It was held that the Superintendent of the Hospital had no right to release a person so committed unless one of these two contingencies had occurred. This Court said:

* * * The substance of the whole act is that the Government of the United States will provide, in its Hospital for the Insane, and will continue therein to provide for its insane soldiers, as well as for those who have ceased to be soldiers, when the insanity or the cause of insanity has arisen in the course of the military service; and that such provision is to continue indefinitely until the person is cured or removed by the authority which committed him.

Now, if this is the conclusion to be drawn from the statute—and we have no doubt in regard to it—it follows, as of course, that the superintendent of the Hospital would have no right to discharge the lunatic in this case from his custody at the Hospital on the grounds of his discharge from the military service subsequently to the commitment.

In the case of *Robertson v. Baldwin*, 165 U. S. 275, 41 L. Ed. 718, the court, in its opinion, stated:

* * * Indeed, seamen are treated by Congress, as well as by the Parliament of Great Britain, as deficient in that full and

intelligent responsibility for their acts which is accredited to ordinary adults, and as needing the protection of the law in the same sense in which minors and wards are entitled to the protection of their parents and guardians: *Quemadmodum pater in filios, magister in discipulos, dominus in servos vel familiares*. The ancient characterization of seamen as "wards of admiralty" is even more accurate now than it was formerly.

In the instant case, Thomas Barry, the petitioner, was determined to be of unsound mind on findings made by the medical officers at the United States Public Health Service. This finding of unsound mind has on three separate occasions since his hospitalization at Saint Elizabeths Hospital on September 2, 1935, been tested by judicial process and on each occasion been confirmed. On the very day that the petitioner came to Saint Elizabeths Hospital, he could, had he so desired, have made an application for a writ of habeas corpus to the District Court of the United States for the District of Columbia and had a full and complete inquisition made into his then mental condition and been released from the hospital in the event such Court found his mental condition to be *compos mentis*.

CONCLUSION

Wherefore, it is most respectfully submitted:

1. That the petitioner is legally detained at Saint Elizabeths Hospital, under a valid statute.

2. That he was of unsound mind when transferred by the Secretary of the Treasury from the United States Marine Hospital at Evansville, Indiana, to Saint Elizabeths Hospital on September 2, 1935.

3. That petitioner's insanity has continued since September 2, 1935, and he is at the present time of unsound mind, which condition has been judicially determined and confirmed on three separate occasions by the District Court of the United States for the District of Columbia.

4. That by virtue of the circumstances in this particular case petitioner has not been denied due process of law.

5. That the public interest and his own welfare have been protected and should he at any time in the future recover his reason, the District Court of the United States for the District of Columbia is available to test his further detention at Saint Elizabeths Hospital upon a petition for writ of habeas corpus.

Respectfully,

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